OAH 16-3100-20113-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERANS AFFAIRS

Ricardo Cano,

Petitioner,

vs.

Hennepin County Medical Center,

Respondents.

RECOMMENDED ORDER GRANTING SUMMARY DISPOSITION

This matter is before Administrative Law Judge Manuel J. Cervantes ("ALJ") on a motion for summary disposition brought by the Hennepin County Medical Center ("HCMC"). HCMC's motion was received on March 27, 2009. Mr. Cano's ("Petitioner") response to HCMC's motion and cross-motion for summary disposition were received on April 22, 2009.[1] HCMC's reply was received on April 24, 2009. The record closed on April 24, 2009, with the receipt of HCMC's reply submission.

John D. Baker, Baker, Wadd, & Williams, LLP, represents Petitioner.

Cheri Sudit, Assistant Hennepin County Attorney, represents HCMC.

Based upon the record in this matter, and for reasons set forth in the accompanying Memorandum, the ALJ makes the following:

RECOMMENDATION

It Is Recommended that: HCMC's Motion for Summary Disposition be DENIED;

That Petitioner's Motion for Summary Disposition be GRANTED; and

That Petitioner be GRANTED a veterans preference hearing.

Dated: May 22, 2009

s/Manuel J. Cervantes
MANUEL J. CERVANTES
Administrative Law Judge

[1] Petitioner attorney's affidavit (Aff.) in support of an award of attorney fees was received on April 17, 2009.

NOTICES

This Report is a recommendation, not a final decision. The Commissioner of the Department of Veterans Affairs ("Commissioner") will make a final decision after a review of the record. The Commissioner may adopt, reject, or modify this Report and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Clark Dyrud, Commissioner of Veterans Affairs, State Veterans Service Building, 20 West 12th Street, Room 206C, St. Paul, Minnesota 55155-2006, to learn the procedure for filing exceptions or presenting argument. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final decision of that agency under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon expiration of the deadline for doing so. The Commissioner must notify the parties and the ALJ of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve his final decision upon each party and the ALJ by first class mail or as otherwise provided by law.

MEMORANDUM

Minn. Stat. § 197.46 provides in part:

> No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.

The issue in this case is whether Petitioner's conduct could appropriately be deemed as job abandonment so as to constitute a voluntary resignation from his job by his employer, HCMC or whether HCMC was obligated to give Petitioner notice of the right to a hearing to determine whether HCMC removed Petitioner for misconduct or incompetency under the Veterans Preference Act ("VPA").[2] HCMC is a political subdivision of the State of Minnesota within the meaning of Minn. Stat. § 197.46. The ALJ and Department of Veterans Affairs ("Department") have jurisdiction pursuant to Minn. Stat. §§ 14.55 and 197.481. The Petitioner was given notice of the hearing in this matter and the Department has complied with all relevant procedural requirements conferring jurisdiction on the Office of Administrative Hearings.

[2] Minn. Stat. § 197.46 (1986).

On December 9, 2008, the Department served a Notice of Petition and Order for Hearing on Petitioner and on HCMC by U.S. mail through their respective counsel.[3] By Scheduling Order, dated January 13, 2009, the ALJ scheduled a hearing for January 30, 2009.[4] The Scheduling Order also required the parties to exchange evidence and to disclose the witnesses that the party intended to call at the hearing.[5] Counsel for HCMC subsequently requested a continuance to February 12, 2009. Counsel for Petitioner did not object and the matter was heard on that date. At the hearing, neither party called witnesses nor submitted documentary evidence. They did, however, engage in oral argument on the legal issues and asked that the ALJ consider the briefs they had previously submitted.

On March 13, 2009, the ALJ issued correspondence indicating that the record was insufficient to make a determination on the merits and requested the parties to perfect what the ALJ construed to be motions for summary disposition. On March 27, 2009, HCMC filed its Motion for Summary Disposition pursuant to Minn. R. 1400.6600, its Memorandum, and Affidavits in support of the motion. On April 22, 2009, Petitioner filed his Response, Cross-Motion for Summary Disposition, his Memorandum, and Affidavits in support thereof. On April 24, 2009, HCMC filed its Reply.

Underlying Facts

Based on the submissions of the parties, it appears the following facts are not in dispute: Petitioner was honorably discharged from the U.S. Army on May 21, 1986.[6] Petitioner was employed by HCMC from 2001 to October 27, 2008.

On October 15, 2008, Petitioner was arrested by the St. Paul Police and taken to the Ramsey County jail pursuant to a 2001 warrant issued by an Ohio court for nonpayment of child support.[7] Petitioner was extradited to Ohio to attend to the warrant. The Ohio judge eventually dismissed all charges and released Petitioner since his child support obligations had been satisfied as of September 5, 2006.[8] The outstanding warrant should have been quashed simultaneously with Petitioner's satisfaction of child support but was not due to an administrative error.[9] Petitioner was released from custody on November 11, 2008.[10]

On October 16, 2008, Petitioner called his friend Darrell Sandin ("Sandin") from the Ramsey County jail and asked him to call his supervisor at HCMC to tell her he would not be at work that day due to an emergency.[11] Sandin called the supervisor and relayed the message. Sandin also called Petitioner's supervisor the following week on

[3] Notice and Order for Hearing (NOH).
[4] Scheduling Order.
[5] *Id.*
[6] NOH.
[7] Petitioner's ("Pet.'s") Aff. and Ex. A to Pet.'s Aff., Unemployment Law Judge Decision, filed March 9, 2009.
[8] Ex. A to Pet.'s Aff., Unemployment Law Judge Decision, filed March 9, 2009.
[9] Pet.'s Aff. and Ex. A to Pet.'s Aff., Unemployment Law Judge Decision, filed March 9, 2009.
[10] Pet.'s Aff.
[11] Ex. 6, Aff. of Kimberly Quistad.

October 20, 22, and 23, 2008, indicating Petitioner would continue to be absent. Petitioner did not personally contact his supervisor to inform her that he would be absent. The Petitioner did not report to work from October 16 to October 27, 2008, for a total of eight work days. On October 27, 2008, his supervisor issued a letter to Petitioner in which she indicated that HCMC had determined that he had abandoned his job and resigned his employment. Although Petitioner attempted to obtain an authorized leave of absence through his Union Representative and Sandin on October, 28, 2008, he was unsuccessful.[12] Shortly after his release from Ohio, Petitioner notified HCMC of his availability to return to work.[13] HCMC did not permit Petitioner to return to work because it considered his conduct to constitute a resignation. On December 15, 2008, Petitioner submitted a timely Petition for Relief under the VPA.[14]

Summary Disposition Standard

Minn. R. Civ. P. 56 provides that summary judgment shall be granted if "there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law."[15] Summary disposition is the administrative equivalent of summary judgment. The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.[16] A genuine issue is one that is not a sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.[17]

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.[18] When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party.[19] All doubts and factual inferences must be resolved against the moving party.[20] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.[21] Summary judgment should only be granted in those

[12] Aff. of Stephanie Secrest, attached to HCMC's Reply; Petitioner requested his Union Representative to file the request for leave document, but HCMC had no executed document from Petitioner authorizing anyone to act on his behalf. Also see, Ex. G.
[13] Pet.'s" Aff. and Ex. A to Pet.'s Aff., Unemployment Law Judge Decision, filed March 9, 2009.
[14] Ex. 2.
[15] Minn. R. Civ. P. 56.03 (1994); *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1995); *Louwegie v. Witco Chemical Corp.,* 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. 1400.5500K
[16] *See*, Minn. R. 1400.6600 (2008).
[17] *Illinois Farmers Ins. Co. v. Tapemark Co*., 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Dep't of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).
[18] *Thiele v. Stitch*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).
[19] *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).
[20] *See, e.g., Thompson v. Campbell,* 845 F. Supp. 665, 672 (D. Minn. 1994); *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971).
[21] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250-251 (1986).

instances where there is no dispute of material fact and where there exists only one conclusion.[22]

Analysis

On October 27, 2008, Petitioner's supervisor issued a "Deemed to Have Resigned" letter to Petitioner. The letter contained the following language:

> Article 14 [sic][23] of the Collective Bargaining Agreement between HCMC and AFSCME Council 5, Local 977 states:
>
> **Any absence of an employee from scheduled duty that has not been previously authorized by the EMPLOYER may be deemed an absence without leave. Any employee absent without leave will be subject to disciplinary action and any employee absent without leave for three (3) consecutive days may be deemed to have resigned his/her employment…[24]**
>
> Failure to report an absence or an unauthorized absence for three consecutive shifts is generally considered job abandonment, which is considered a voluntary resignation from employment.[25]
>
> As of October 27, 2008, we have deemed you to have resigned from Hennepin County Medical Center.
>
> A veteran is entitled to notice, and if requested within 60 days, a hearing under the Veteran's [sic] Preference Act (Minn. Stat. §197.46) prior to a public employer removing a veteran from employment. You, however, abandoned your job; and pursuant to the collective bargaining agreement, you have resigned your employment. Therefore, under the case of Mack v. Hennepin County, No. C2-96-483 (Minn. Ct. App. Sept. 17, 1996), rev. denied (Oct.29, 1996), you are not entitled to the notice and hearing provisions of the Veteran's [sic] Preference Act.

The remaining relevant language of Article 15 was not quoted in the letter, and reads as follows:

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[22] *Id.*

[23] The supervisor indicated the quoted language was from Article 14 of the collective bargaining agreement. The language is actually from Article 15.

[24] Emphasis in original.

[25] Ex.1. This language is taken from the HCMC Human Resources Policies and Procedures, Resignation From Employment, A. 3, Ex. 6. However, "[i]f any information in the policies and procedures conflict in any way with applicable collective bargaining agreements or legal requirements, the collective bargaining agreement and/or legal requirements supersede the information in the policy and/or procedure; otherwise, HCMC's decisions as to the interpretation of this information will be final and binding." Ex. 6, F, Policy #: 001946. Thus, the collective bargaining agreement language in Article 15 quoted above, not HCMC policy, governs this case. Contrary to the assertion of HCMC, the language of the collective bargaining agreement and the language of HCMC Human Resources policy are not identical.

> … provided the EMPLOYER may grant approval for leave subsequent to the unauthorized absence if the employee can conclusively establish to the EMPLOYER that the circumstances surrounding the absence and failure to request leave were beyond the employee's control.[26]

HCMC policy defines "Unscheduled Absence: [as] [a]n absence not approved in advance", and states at paragraph 9: "The standards described in this policy are intended to serve as general guidelines. HCMC evaluates and responds to situations of absenteeism and tardiness on a case-by-case basis considering factors such as length of employment, job performance, and other criteria deemed relevant."[27]

There are three significant difficulties with the position taken by HCMC in this case. The first relates to the failure to include the proviso set forth in Article 15 cited above in the notice issued to Petitioner on October 27, 2008. The omitted collective bargaining agreement language grants an employee an opportunity to demonstrate that the circumstances surrounding his absence were beyond his control. The October 27, 2008 letter did not notify Petitioner of this exception or give him the opportunity to demonstrate that the circumstances causing his absence were beyond his control and it was appropriate for HCMC to grant a leave of absence after the fact. Second, HCMC concluded, based on the limited information it had at the time, i.e., that Petitioner had been arrested and that he had been absent from work for eight days, that Petitioner's absence from work was due to incarceration, HCMC assumed it was his fault, and therefore, this conduct constituted voluntary resignation. And, third, it does not appear based on the present record that HCMC followed its own Human Resources policy that each case be considered on its own merit, on a case-by-case- basis considering factors such as length of service, job performance, and other criteria deemed relevant.[28]

HCMC relies on four Minnesota cases in support of its decision to find that Petitioner abandoned his job which was tantamount to resignation. As discussed below, none of these cases compels the conclusion that HCMC is entitled to judgment as a matter of law in the present case.

First, HCMC relied on *Mack v. Hennepin County* ("*Mack*"),[29] which was cited in its "Deemed to Have Resigned" letter. HCMC cites *Mack* for the proposition that it was within the authority of HCMC to deem Petitioner to have abandoned his job and voluntarily resigned because he absented himself from his job for three consecutive days or more and it was appropriate for HCMC to decide that he was not entitled to the VPA Notice or Hearing. However, a review of the *Mack* decision, and others cited by HCMC, do not lead the ALJ to that conclusion.

The *Mack* decision is an unpublished decision and, while it may have persuasive value, it is not binding and its application is limited to the facts of that case. A review of the facts in *Mack* show they are readily distinguishable from Petitioner's case. In *Mack*,

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[26] Ex. 5.
[27] Ex. 6, F, Policy #: 001935.
[28] *Id.*
[29] 1996 WL523818 (Minn. App.), unpublished.

the supervisor was having trouble with the employee, Mack, because he was leaving work whenever he wanted to attend to personal matters. In response, the supervisor imposed certain conditions on him. Mack disregarded his supervisor's directive to communicate with him, or another supervisor, when he would not be at work. Mack failed to follow this order on 12 different occasions over the course of the next 16 days. Mack also disregarded his supervisor's directive to provide medical documentation for a medical issue he claimed to have.

The *Mack* court reasoned:

> On these facts, we conclude Mack was not removed from his employment within the meaning of [the VPA] Minn. Stat. 197.46. Mack was a member of the union and does not dispute that the bargaining agreement governing his employment with the county provided that he would be deemed to have resigned if he failed to report for three consecutive days without permission for proper leave.[30]

The inference to be drawn from the court's rationale is that Mack's conduct, voluntarily absenting from work a dozen times over the course of 16 days without explanation, and in violation of his supervisor's directives, was so egregious as to constitute voluntary abandonment of his job. In effect, Mack resigned.

Those facts are not similar to the current case: here, there is no evidence in the record that Petitioner was a problem employee who had violated supervisory conditions that had been imposed upon him. Viewing the facts in the light most favorable to Petitioner, he was absent from work through no fault of his own but rather because he was arrested and extradited from the state for an old and improper child support warrant.[31] Also, Petitioner made significant efforts to obtain a leave of absence from HCMC,[32] albeit unsuccessfully. The factual inferences that are to be drawn from these efforts are that he did not wish to relinquish his job; instead, he attempted to preserve it.

The *Mack* case is further distinguishable from the current case because there is no evidence that the collective bargaining agreement involved in *Mack* gave Mack the rights contained in Article 15 of the collective bargaining agreement that apply to the Petitioner in the current case, including the specific language omitted from the notice.

Second, HCMC relies on *Andersen v. City of Minneapolis* ("*Andersen*")[33] for the proposition that the VPA is inapplicable to an employee who voluntarily terminates his employment. In *Andersen,* the employee sought and received a non-work-related disability pension. The Minnesota Supreme Court held that, when Andersen went on voluntary disability leave, he ceased to be an "employee" of the city and therefore, he was not "removed" from his job within the meaning of the VPA and was not entitled to a

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[30] *Id.*
[31] Pet.'s Aff. and Ex. A to Pet.'s Aff., Unemployment Law Judge Decision, filed March 9, 2009.
[32] The record shows that Petitioner requested Sandin to file the request for leave document, but HCMC had no executed document from Petitioner authorizing anyone to act on his behalf.
[33] 503 N.W.2d 780 (Minn. 1993).

hearing. Unlike *Andersen,* Petitioner did not seek a voluntary disability pension or any status other than that of an employee. *Andersen* does not apply to the facts in the current case. It was HCMC's act of deeming Petitioner to have abandoned his job, prior to fulfilling its obligations under the collective bargaining agreement and Human Resource policy that prevented him from returning to work once he was released from the improper arrest and incarceration. "[U]nder the Veterans Preference Act, a veteran is removed from his or her position or employment when the effect of the employer's action is to make it unlikely or improbable that the veteran will be able to return to the job."[34] It was HCMC's premature determination that Petitioner resigned that, in effect, removed Petitioner from his job.

Third, HCMC relies on the decision of the Minnesota Court of Appeals decision in *Schluter v. City of Minneapolis* (*Schluter*).[35] The court held that an employee who is absent from work without approved leave because he committed a crime and is incarcerated is not entitled to a VPA notice or hearing. His criminal conduct was voluntary and constituted a resignation, not a removal attributable to the City. Schluter was a truck driver for the City employer. The City became suspicious that Schulter may have driven for the City while his driver's license was suspended so a meeting with Schluter was scheduled. Schluter failed to appear or request a continuance. A couple of days later, Schluter called his supervisor and said he was sick and would be out of work for a few days. Before his supervisor could ask him any questions, Schluter hung up. In fact, Schluter was to appear in District Court that day to answer charges related to assault, stalking, and harassment of his estranged wife. Schluter was convicted and sentenced to prison that same day. A couple of days later, Schluter called his supervisor to advise that he expected to get work release. Work release was denied but Schluter failed to advise his supervisor of this fact. Schluter did not apply for a leave of absence, although it was unlikely that it would have been approved since the City's policy did not allow granting leaves of absence for incarceration. A month later, the City rescheduled the meeting for the driving after suspension issue. Again, Schulter failed to appear or reschedule. Two weeks later, the City sent a letter of termination to Schluter's last known address, effective the date of the second scheduled meeting. The letter of termination gave several reasons for the discharge: failure to report the driver's license suspension, failure to be available for call-out [for work], absence without leave, and failure to attend scheduled meetings. Schluter was released from incarceration after a period of nine months.

The *Schluter* court agreed with the ALJ, who found that Schluter failed to prove by a preponderance of the evidence that the City had removed him from his employment. On the contrary, the court found that Schluter's conduct, which led to his incarceration, resulted in the abandonment of his job when he absented his job without approved leave. His resignation was not involuntary because his voluntary actions led to his incarceration. Lastly, Schluter's incarceration and voluntary resignation were not attributable to the City.

[34] *Myers v. City of Oakdale,* 409 N.W.2d 848, 850-51 (Minn. 1987).
[35] 2004 WL2987158 (Minn.App.), unpublished.

Again, the facts in *Schluter* are distinguishable from Petitioner's case. Nowhere herein is it alleged that Petitioner committed a crime or that his incarceration was attributable to any sentence for a crime. The recurring theme in *Mack* and *Schluter* is that the employees' conduct was so egregious and voluntary that their extended absences from work constituted job abandonment, tantamount to voluntary resignations, and not removal under the VPA. In contrast, the facts in the present case do not involve egregious or voluntary conduct on the part of Petitioner. He did not voluntarily ignore the directives of his supervisor or commit a crime that landed him in jail. Nor was his absence extensive before he was deemed to have resigned. The record before us does not show there was voluntary conduct on Petitioner's part that caused his incarceration, but unlike the facts in *Schluter*, does show that he attempted to preserve his job by having third parties, his union and Sandin, file a leave of absence request on his behalf.[36] Petitioner's facts do not amount to the voluntary and egregious conduct evinced in *Mack* and *Schluter* so as to constitute job abandonment, tantamount to a voluntary resignation.

Lastly, HCMC relies on *Grushus v. Minnesota Mining and Manufacturing Company*[37] (*Grushus*) to rebut Petitioner's argument that he did not voluntarily relinquish his job. HCMC cites *Grushus* for the proposition that because Petitioner was not available for work during the time frame at issue, HCMC was not obligated to keep his job open until he might be released from custody. The Supreme Court held that Grushus was disqualified for unemployment benefits because his criminal conduct resulted in a guilty plea, incarceration, and his unavailability to return to work when called upon by his employer. *Grushus* is not a VPA case but rather an unemployment benefit case. In *Grushus,* the employee was not available to return to work after a lay-off due to his incarceration after he pled guilty to burglary/larceny charges. A requisite element in determining entitlement to unemployment benefits is whether the employee was available for work. *Grushus* is distinguishable from the instant case because it does not involve the VPA, bargaining contract language, or human resource policy, but it is instructive, nonetheless. Grushus pled guilty to burglary/larceny charges. The court found support for its ruling in the public policy statement behind the unemployment insurance program[38] which indicates that unemployment reserves were to be used "for the benefit of persons unemployed through no fault of their own."

Like the *Schluter* analysis above*,* Grushus committed a voluntary act constituting a crime which resulted in incarceration. Consistent with *Schluter,* the *Grushus* court determined that an employee who commits a crime for which he is incarcerated cannot avail himself of a law that is intended to protect a "faultless" employee. Here, while it is true that Petitioner was not available to work for a period of time due to incarceration, it appears from this record that his incarceration was not his fault.[39] The record shows that Petitioner was arrested erroneously for a 2001 child support issue that was

[36] Ex. G.
[37] 100 N.W.2d 516 (Minn. 1960).
[38] Minn. Stat §268.03 (1936) and Id*.,* p. 519.
[39] Pet.'s Aff. & Ex. A to Pet.'s Aff.; Unemployment Law Judge Croft's decision, filed March 9, 2009.

resolved in 2006.[40] HCMC objects to this evidence, arguing that Petitioner has not produced any objective documentary evidence to support his position. While the ALJ agrees that additional documentary evidence may have been helpful, Petitioner did provide a sworn affidavit attesting to the above facts and the Unemployment Law Judge made specific findings of fact consistent with Petitioner's sworn affidavit and found that Petitioner was discharged for reasons other than misconduct. The Unemployment Judge awarded unemployment benefits to Petitioner which is contrary to the result in *Grushus*. HCMC did not provide any evidence calling the facts asserted in Petitioner's affidavit and the Unemployment Judge's decision into doubt.

Accordingly, the ALJ recommends that HCMC's motion for summary disposition be denied because it has not shown that it is entitled to judgment as a matter of law, and that the Petitioner's motion for summary disposition be granted. It is undisputed that Petitioner was issued the "Deemed to Have Resigned" letter on October 27, 2008 after having absented from work for eight days; the letter failed to give Petitioner accurate notice of his rights pursuant to the parties' collective bargaining agreement; the notice failed to disclose his right to attempt to demonstrate that the circumstances surrounding his absence were beyond his control; HCMC did not grant Petitioner the opportunity to demonstrate that the circumstances surrounding his absence and failure to request leave were beyond his control; and there is no evidence that HCMC evaluated and responded to Petitioner's absence on a case-by-case basis considering factors such as length of employment, job performance, and other criteria deemed relevant in accordance with its Human Resources policy.[41] In the ALJ's view, reasonable minds can not differ as to the import of the evidence and judgment should be granted to the Petitioner as a matter of law on the issue presented here, namely, whether HCMC was obligated to give Petitioner notice of the right to a hearing to determine whether HCMC removed Petitioner for misconduct or incompetency under the VPA.[42] Let the record be clear, by this report the ALJ has not made a decision on the underlying merits of this case but has determined that HCMC had certain obligations to Petitioner under its collective bargaining agreement and Human Resource policy which it failed to provide. Had HCMC met these obligations, it may have obviated the necessity for a VPA notice and hearing. Because HCMC did not meet those obligations, it is further recommended that HCMC give the requisite notice and afford Petitioner an opportunity for a VPA hearing and award Petitioner all entitlements he would have earned had he not been removed as well as back pay from and after October 27, 2008.

Lastly, because this report is not a final decision, the request for an award of attorney fees is premature, and it is hereby recommended that the request be DENIED.

M. J. C.

[40] *Id.*
[41] *Id.*
[42] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250-251 (1986).